88-359 (2)

Supreme Court, U.S.
FILED
AUG 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1988

Dale G. Button and Glorianna Button,
husband and wife,

Petitioners,

v.

Connecticut General Life Insurance Company
and Cigna Insurance Company,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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47 pp

Questions Presented

I. Are the United States District Court for the District of Arizona and the United States Court of Appeals for the Ninth Circuit free to disregard the requirements of Rule 56 of the Federal Rules of Civil Procedure?

II. Has the Ninth Circuit's failure to properly review the District Court's summary judgment by its omission of a material fact holding serve as a threat to the uniform application of the rules of civil procedure?

III. Does the Supreme Court have the supervisory authority and duty to preserve the uniform application of Rule 56 throughout the Federal system so as to ensure the equitable and fair administration of justice?

List of Parties

The parties to the proceedings below were the Petitioners, Dale G. Button and Glorianna Button, husband and wife, and the Respondents, Connecticut General Life Insurance Company and Cigna Insurance Company.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners Dale G. Button and Glorianna Button respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, filed in the above entitled proceeding on May 26, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is No. 8602741, D. C. No. CV85-985-T-ACM and is reprinted in the appendix hereto, App. 1.

The Memorandum of Decision and Order of the United States District Court for the District of Arizona (Marquez, D. J.) is reprinted in the appendix hereto, App. 16.

JURISDICTION

The Ninth Circuit, on May 26, 1988 entered a judgment and opinion affirming the District Court decision.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U. S. C. Section 1254(1) in which Congress has provided the Supreme Court with plenary jurisdiction to review cases in the Federal Courts of Appeal by "Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." *Forsyth v. Hammond*, 166 U. S. 506, 511-13 (1897).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

United States Constitution, Seventh Amendment, Trial by Jury

28 U. S. C. Federal Rules of Civil Procedure, Rule 56 Summary Judgment

Rule 56(c) states in pertinent part that:

> The judgment sought shall be rendered forthwith if the pleadings, deposition, answers to interrogatories, and admissions on file together with affidavits, if any, show that there is *no genuine issue as to any material fact 'and' that the moving party is entitled to a judgment as a matter of law.* [Emphasis added.]

STATEMENT OF THE CASE

The origins of this case and the subsequent appeal stem from the wrongful and premature termination of total disability income benefits due and owing to Petitioner, Mr. Dale Button, by the Respondent, CIGNA Insurance Company.

On September 8, 1975, the Petitioner, Dale Button, applied for and purchased an insurance policy from an agent of the Respondent, Connecticut General Life Insurance Company. The policy in question (#M1646552) provided Petitioner with lifetime disability income indemnity insurance in the event of an injury to the Petitioner, and five years of benefits if disabilities were caused by disease. On December 16, 1979, while said policy was in full force and effect, Petitioner attempted to lift a sheet of heavy roofing material. While in the process of lifting this material in a wind storm, Petitioner twisted his back in such a manner as to sustain an injury to the lower back which has since rendered Petitioner totally disabled.

Shortly after sustaining the injury, Petitioner filed a claim with the local office of the Respondent insurer with one of their local agents. The claim was then sent by the agent to the former headquarters of Respondent in

Racine, Wisconsin where it was coded by an agent of the Respondent as "INJ" or "O" which was a code name or number representing a claim submitted by an insured for an injury which arose out of an accident.

The claims department in Wisconsin then sent requisite forms to the actuary department in Connecticut so as to allow the actuary to set aside the proper amount of reserves with respect to the claim. The claims form received by the actuary indicated that the claim sustained by the Petitioner was coded as an injury arising out of an accident. In conformance with the claims form which had been sent by the claims department, the actuary set aside enough in reserves to cover the payment of lifetime benefits to Petitioner.

Petitioner began to receive total disability payments based on what he believed to be a lifetime benefit schedule. In fact, as of August 13, 1980, some nine months after the Petitioner's claim had been submitted, the claim form continued to reflect Mr. Button's injury as a "back injury". From approximately March 1980 to August 9, 1985, Petitioner continued to receive monthly benefit payments in the amount of $700 from the Insurer. It was not until April 15, 1985 that the Petitioner was suddenly notified by Respondent that the Petitioner's injury had been reclassified as one arising out of an illness or sickness and that the payment of benefits would therefore cease. Petitioner, however, continued to receive payments for an additional four months after the sixty month payment period or until August, 1985. Petitioner has not received any further benefit payments since that time.

On October 17, 1985, a complaint was filed by the Petitioner against the Respondents in the Superior Court of the State of Arizona.

The action was thereafter removed by Respondents to the United States District Court for the District of Arizona in accordance with 28 U. S. C. Section 1441(a) and Section 1332 (a)(1) based on diversity of citizenship and an amount in controversy exceeding ten thousand dollars ($10,000).

On June 26, 1986 the Respondent filed a motion for summary judgment. On July 30, 1986 the Petitioner filed an opposition to the Respondent's motion for summary judgment. On August 12, 1986 the Respondent filed a reply memorandum to the Petitioner's opposition to the motion for summary judgment.

Summary judgment was subsequently granted and the judgment was entered for the Defendants-Respondents on September 8, 1986.

Petitioners filed a Notice of Appeal with the United States Court of Appeals for the Ninth Circuit on October 8, 1986. A Memorandum of Decision and Order was issued by the trial court subsequent to the filing of the notice of appeal on October 15, 1986.

The Ninth Circuit Court of Appeals affirmed on the 26th day of May, 1988.

REASONS FOR GRANTING THE WRIT

I

The District Court and the Ninth Circuit's failure to follow the requirements of Federal Rule of Civil Procedure 56 is an abuse of discretion and conflicts with the decisions of This Honorable Court and other Circuit Courts of Appeal.

A close examination of the District Court's order and the Ninth Circuit's opinion show that both courts have failed to follow Federal Rule of Civil Procedure 56 in that both ignored the existence of genuine issues of material fact. The courts omission and misapplication of the summary judgment procedure is an abuse of discretion which deserves this Court's attention.

If this Honorable Court fails to grant a writ of certiorari in this case, the negative impact will be threefold:

A. If the Ninth Circuit's decision is allowed to stand, havoc will be wrought upon the uniform and equitable system of civil procedure governing summary judgments;

B. A grievous personal injustice will be rendered to the Petitioners, Mr. and Mrs. Button, who will be deprived of their day in court before an unbiased fact-finder so they can be given a chance to prove that Mr. Button's totally disabling back injury was solely related to the wind-related accident;

C. The reasonable expectations of the Petitioners that the insurance company, Respondent, will pay off on the lawfully negotiated insurance disability contract will not be realized.

A. Havoc will be wrought upon the uniform and equitable system of civil procedure governing summary judgments.

Summary judgment on a claim is appropriately granted only where no genuine issue of material fact remains for trial and the moving party is entitled to judgment as a matter of law. Federal Rules of Civil Procedure 56(c), *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F. 2d 675, 677 (9th Cir., 1984); *K. L. Group v. Case, Kay and Lynch*, 829 F. 2d 909, 914, 915, 917 (9th Cir., 1987).

Under the above standard evidence will be viewed in the light most favorable to the non-moving party, in this case the Petitioner. *Aston v. Cory*, 780 F. 2d 816, 818 (9th Cir., 1986); *Schlenz v. United Airlines, Inc.*, 678 F. Supp. 230 (N. D. Cal. 1988). The moving party may only prevail if, on the record taken as a whole, a rational trier of fact could not reach a verdict in the plaintiff's favor. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U. S. 574, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby Inc.*, 477 U. S. 242, 106 S.Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).

In the case at bar, the Ninth Circuit decision failed to apply the above cited standards in its de novo review of the District Court's summary judgment order. *Darring v. Kincheloe*, 783 F. 2d 874, 876 (9th Cir., 1986). Instead, the Ninth Circuit acted as a trier of fact noting that "the determining factor here is causation" (see Ninth Circuit opinion at p. 6056, 6058 Appendix App. 3). At no point in their discussion do the Ninth Circuit justices refer to the Rule 56 standard of review or the decisions of the Ninth

Circuit and this Court governing summary judgment in finding against the Petitioner.

The Petitioner is left a bit numb by the Ninth Circuit's rendition of the facts that is not much more than a recapitulation of the District Court's unsolicited post judgment memorandum. The Petitioner's arguments under Rule 56(c), that there are genuine issues of material fact remaining for trial, and that the insurance company is not entitled to judgment as a matter of law, have fallen on deaf ears.

The ramifications of the Ninth Circuit's failure to apply the conjunctive standard of Rule 56 are ominous to a uniform and equitable system of procedural justice. If the decision is allowed to stand it will serve notice on the federal courts of appeals that they are free to disregard decisions of this Honorable Court in their de novo review of a district court's granting of summary judgment. Given this Court's conservative posture with regard to certiorari review of diversity cases, the Ninth Circuit's action raises the alarming specter that not only is the summary judgment procedure being abused, but the administration of the *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938) principle of federal courts applying state substantive law is being abused as well.

B. A grievous personal injustice will be rendered to the Petitioners who will be deprived of their day in court before a jury of their peers.

As noted in *Anderson v. Liberty Lobby Inc.*, 477 U. S. 242, 106 S.Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986) hereinafter cited as *Anderson:*

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and justifiable inferences are to be drawn in his favor. Neither do we suggest the trial court should act other than with caution in granting summary judgment . . . citing *Adickes v. S. H. Kress and Company*, 398 U. S. 144, 158, 159, 90 Sup. Ct. 1598, 1608-09, 26 L. Ed. 2d 142 (1970); *Kennedy v. Silas Mason Company*, 334 U. S. 249, 68 Sup. Ct. 1031, 92 L. Ed. 1347 (1948).

The District Court and Ninth Circuit usurped the fact finding function of the adjudicative process by weighing the evidence gleaned through the pretrial process. In so doing, the courts below failed to heed the cautionary limitations suggested by this Court in *Anderson, supra*. A close reading of the Ninth Circuit's opinion shows that the justices did not expressly hold that, *there was no genuine issue of material fact in the case at bar.* The opinion proceeds to weigh the evidence as a judge sitting as a fact finder.

As *Black's Law Dictionary* at page 618 notes:

> A genuine issue of fact precluding summary judgment exists wherever there is slightest doubt as to facts. *Seliga Shoe Stores, Inc. v. City of Maplewood*, 558 S. W. 2d 328, 331 (Mo. App., 1977).

The Ninth Circuit's cavalier disregard for the lists of material facts at issue set out and applied by the Petitioners in the opposition to motion for summary judgment and the briefs before the Ninth Circuit amount to a direct violation of the Petitioners' right to a jury trial as

provided for in the Seventh Amendment to the United States Constitution.

The list of genuine material facts at issue are more than mere conclusory assertions. *Chesebrough-Pond's Inc. v. Faberge, Inc.*, 666 F. 2d 393 (9th Cir.) cert. denied, 459 U. S. 673 (1982) and *Shah v. Mt. Zion Hospital and Medical Center*, 642 F.2d 268 (9th Cir. 1981). Some of the genuine issues of material fact are as follows:

1) Whether the Petitioner's permanent and total back disability was solely caused by a lifting accident as opposed to degenerative back disease.

2) Whether the Petitioner had a reasonable expectation of continuing coverage under the policy for back injury notwithstanding prior degenerative back disease.

3) Whether a reasonable person would anticipate the insurance policy's incontestability clause would favor Petitioner.

4) Whether the insurance company's actions should estop them from asserting a disease related claim.

There is no doubt that substantial evidence existed to support the Petitioner's position that there were genuine issues of material fact and that the insurance company Respondent should not be entitled to judgment as a matter of law. Questions of material fact pertaining to the classification of the Petitioner's injury, the wording of pertinent policy provisions, and estoppel due to the initial classification of the disability claim by agents of the insurance company should have prevented the courts below from granting summary disposition. Had the courts below addressed the genuine issues of material

fact allegations, they would not have reached the second test of entitlement to judgment as a matter of law.

This Honorable Court is the Petitioner's last resort to rectify the grievous personal injustice rendered to him.

C. The reasonable expectations of the Petitioners will not be realized if this Court fails to grant review.

The Petitioner, Mr. Button, age 37 at the time of injury, was a self-employed laborer who had a back condition. Mr. Button had previously contracted with Respondent insurance company so as to protect his family's financial future in the case of subsequent accident or sickness. The insurance company was aware of Mr. Button's predisposition for back injury, however, no special provision excluding back injury coverage was added to the policy.

When the Petitioner permanently and totally injured his back subsequent to the purchase of the policy, Mr. Button was not only left without his only means of support, but, to his agonizing amazement, found that the Respondent insurance company would not pay off on its contract. The Petitioner, however, had the reasonable expectation that he would get the benefit of his bargain on the disability insurance contract, that is, if there was a subsequent accident, that disabled him for life, the insurance company would pay off.

The linchpin factual issue in Mr. Button's suit against the disability insurance carrier is whether any pre-existing back condition disabled him prior to the injury. If so, the coverage would be limited to five years, if not, for life. Chief Judge Cardozo (later appointed to the United

States Supreme Court) analyzed the problem in *Silverstein v. Metropolitan Life Insurance Co.*, 254 N. Y. 81 (1930) as follows:

> In a strict or literal sense, any departure from an ideal or perfect norm of health is a disease or an infirmity. Something more, however, must be shown to exclude the effects of accident from the coverage of a policy. The disease or the infirmity must be so considerable or significant that it would be categorized as disease or infirmity in the common speech of men . . .
>
> Our guide is the reasonable expectation and purpose of the ordinary businessman when making an ordinary business contract. *A policy of insurance is not accepted with the thought that its coverage is to be restricted to an Apollo or a Hercules* . . .
>
> A distinction then, is to be drawn between a morbid or abnormal condition of such quality or degree that in its natural or probable development it may be expected to be a source of mischief, in which event it may fairly be described as a disease or an infirmity, and a condition abnormal or unsound when tested by a standard of perfection, yet so remote in its potential mischief that common speech would call it not disease or infirmity but at most predisposing tendency. *Silverstein, supra,* at page 84 [Emphasis added].

The District Court and Circuit Court ruled as a matter of law in a Rule 56 summary judgment procedure that Mr. Button's total disability was caused by disease. Petitioner asserts that to so find is beyond the realm of the federal courts in a Rule 56 proceeding where there are many facts which would lead a reasonable juror to a different result. This Honorable Court and the Congress

have spoken, but, the Federal Courts do not listen. Perhaps it is time for the Supreme Court to regain their attention.

Justice Cardozo continues his analysis in *Silverstein* at page 85 as follows:

> . . . a recovery will not be denied to a sufferer from hernia who had a predisposition to rupture because the inguinal canal was not closed as it ought to have been . . . or to one whose hip has been fractured because his bones have become brittle with the advent of age. 'If a man with an abnormally thin skull be struck a blow which would not seriously injure a normal man, but which causes death, it is perfectly plain that the cause of death is not the thinness of skull but the receipt of the blow.' *Mutual Insurance v. Dodge*, 11 F. 2d 486, 489 (4th Cir., 1926). An appendix already gangrenous is one thing . . . and quite another is an appendix, not presently malignant, though a potential source of infection in the future if left in the body.

Petitioner has continually argued that there is a genuine discrepancy of material facts regarding whether he had a mere predisposition for back injury or was suffering from a disabling back disease prior to this injury. For the courts below to decide this issue as a matter of law is to mock the Petitioner's reasonable expectation that he and his family would be covered under the insurance contract.

For the federal courts to say to this disabled laborer in Arizona that his case doesn't merit a jury trial is to close the doors of the courthouse to an honest and law abiding citizen. Mr. Button's disability insurance policy was not contracted for with the thought that its coverage was to *be restricted to an Apollo or a Hercules*. Contrarily, Mr. Button was issued a policy with the full knowledge

that he had prior back problems. Respondent paid benefits for over five years and terminated them because the words "degenerative disc disease" appeared in Petitioner's treatment records five years after he was rendered totally disabled by an accidental injury. To permit Respondents to deny further benefits in the face of the conflicting evidence on causation of Mr. Button's disability was a travesty of justice.

II

The Supreme Court has the Inherent Supervisory Authority and Duty to Preserve the Uniform Application of Rule 56 nationwide.

The foregoing reasons for granting this writ of certiorari answer the first two *Questions Presented* on page i, that is:

1. The Ninth Circuit is not at liberty to disregard the federal rules of civil procedure governing summary judgment; and

2. The Ninth Circuit's disregard of the tenets of Rule 56 is an implicit threat to the uniform application of summary judgment procedure in the Federal Court system.

The final question presented by this writ is whether the Supreme Court has the inherent authority and duty to preserve the uniform application of Rule 56. The question is answered in the affirmative.

As the Highest Court in the Federal system, the Supreme Court is charged with the duty to ensure that the lower courts of the federal judiciary are functioning lawfully. Rule 17.1(a) of the Supreme Court Rules governing review on certiorari delineates the supervisory role of the Court as follows:

> "When a federal court of appeals . . . has so far departed from the accepted and usual course of judicial proceding, or so far sanctioned such a departure by a lower court, as to *call for an exercise of the Court's power of supervision.*" [Emphasis added.]

The Petitioner submits that the misapplication of Rule 56 is precisely the type of situation that calls for the invocation of supervisory authority by this Honorable Court. The lower court's decisions are a threat to the goal of uniformity of federal procedure. *McNabb v. United States,* 318 U. S. 332 (1943); *Hickman v. Taylor,* 329 U. S. 495 (1947); *Hanna v. Plumer,* 380 U. S. 460 (1965); *Moses H. Cone Hospital v. Mercury Construction Corp.,* 460 U. S. 1 (1983).

More important, a still, small voice is calling from the desert, justice demands an answer.

CONCLUSION

The Petitioner respectfully requests that this Honorable Court exercise its discretionary supervisory authority over the Ninth Circuit in order to ameliorate the threat to a uniform system of civil procedure and to permit Petitioner to proceed to a decision upon the merits on his disability insurance breach of contract claim.

WHEREFORE, for these various reasons, Petitioner prays that this Honorable Court grant his petition; his costs herein lawfully incurred, and such other and further relief as it deems appropriate in the Premises.

Respectfully submitted this 24th day of August, 1988.

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DALE G. BUTTON and GLORIANNA BUTTON, husband and wife, *Plaintiffs-Appellants,*	)	No. 86-2741
v.	)	D.C. No. CV 85-985-T-ACM
CONNECTICUT GENERAL LIFE INSURANCE COMPANY; and CIGNA INSURANCE COMPANY, *Defendants-Appellees.*	)	OPINION

Appeal from the United States District Court
for the District of Arizona
Alfredo C. Marquez, District Judge, Presiding

Argued and Submitted
October 8, 1987 – San Francisco, California

Filed May 26, 1988

Before: Procter Hug, Jr., Robert Boochever and
Melvin Brunetti, Circuit Judges.

Opinion by Judge Boochever

SUMMARY

Insurance/Contracts

Appeal from summary judgment. The court affirmed holding that appellant's disabling accident was not the sole cause of his injury thereby precluding lifetime benefits.

Appellees Connecticut General Life Insurance Company and Cigna Insurance Company (CGL) issued a policy of disability income indemnity insurance to appellant

Button. While lifting, Button twisted his lower back and has been totally disabled since. CGL initially classified the claim as an injury arising out of an accident. It subsequently reclassified the disability as arising out of sickness. Button suffered from recurring back problems prior to the lifting accident. He also suffers from a degenerative disc disease. CGL claims that the disease contributed to Button's disability. Button insists that the accident was the sole cause of his disability. The district court granted CGL's motion for summary judgment concluding that Button's injury was caused or contributed to by his degenerative disc condition. The court also held that the incontestability clause did not invalidate other provisions in the policy.

[1] In order to receive lifetime benefit payments, Button's total disability must be the result of an accident independent of all other causes. [2] The Arizona Supreme Court has applied the *Greber* test to a disability insurance case. [3] The testimony of Dr. Toll indicates that Button had a preexisting disc problem. [4] Because the accident was not the sole cause of Button's disability, he is not entitled to lifetime benefits. [5] Courts have uniformly construed incontestability clauses as barring an insurer from declaring a policy invalid on the basis of misrepresentation in the application after lapse of the specified period. [6] The incontestability clause relates to the validity of the contract and not to the construction of policy provisions. [7] Button contends that his disability was caused solely by the lifting accident and that the incontestability clause precludes CGL from inquiring into his back condition to contest his claim. CGL merely contends that the disease, *regardless of when it arose,* contributed to

Button's disability. The determining factor here is causation. [8] The policy does not penalize Button for having a disease preexisting the issuance of the policy.

COUNSEL

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William W. Edwards and Lyle D. Aldridge, Jones, Edwards, Smith & Kofron, Tucson, Arizona, for the defendants-appellees.

OPINION

BOOCHEVER, Circuit Judge:

Dale and Glorianna Button (Button) appeal from a grant of summary judgment in favor of Connecticut General Life Insurance Company and Cigna Insurance Company (CGL) in Button's action for continued benefits under a disability insurance policy. The issues presented on this appeal are whether: (1) Button is entitled to lifetime benefits for a back injury causing disability independent of other causes; (2) the policy's incontestability clause prevents CGL from relying on a preexisting condition to deny coverage; and (3) a change in classification of Button's injury, resulting in termination of benefits, constituted bad faith and/or estopped the company from refusing to pay lifetime benefits. We affirm.

FACTS

In September of 1975, CGL issued a policy of disability income indemnity insurance to Button. On or about December 16, 1979, Button twisted his lower back while lifting a sheet of roofing material in the wind. Button has been totally disabled since. Pursuant to Button's claim, CGL paid monthly benefits for sixty-eight months from December 16, 1979 through August 9, 1985. CGL initially classified the claim as an injury arising out of an accident and its actuary set aside a lifetime reserve for benefit payments. CGL subsequently reclassified the disability as arising out of sickness, but did not notify Button of the change until shortly before termination of benefits. Under the policy, the maximum indemnity period for disability caused by sickness is sixty months. Indemnity for disability caused by injuries may extend over a lifetime.

Button suffered from recurring back problems prior to the 1979 lifting accident. Button was treated for back pain by his physician, Dr. Toll, in the 1960s and in 1973 and 1974. A lifting accident in 1976 forced Button to see Dr. Toll again for back pain. In a deposition, Button testified that between May 1977 and December 1979, he continued to suffer intermittent back problems. It is undisputed that Button suffers from a condition known as degenerative disc disease. CGL claims that the disease contributed to Button's disability, and that Button's disability therefore should be deemed a sickness as defined in the policy. Button contends his previous condition did not contribute to his disability. He insists that the 1979 accident was the sole cause of his disability. Button further argues that the incontestability clause of the policy

bars CGL from reducing his claim on the basis of a preexisting disease.

The district court granted CGL's motion for summary judgment. The court concluded that Button's injury was caused or contributed to be his degenerative disc condition. The court also held that the incontestability clause did not invalidate other provisions in the policy.

DISCUSSION

I. *Causation*

[1] This diversity case is governed by the substantive law applicable in the forum state. As such, Arizona law is controlling. *See Strassberg v. New England Mutual Life Ins. Co.*, 575 F.2d 1262, 1263 (9th Cir. 1978). The dispositive issue is whether Button's disability was the direct result of an accident, independent of all other causes. The insurance policy provides in relevant part:

> *Total Disability Defined.* The Insured will be considered to be totally disabled if, as a result of sickness contracted and commencing while this policy is in force, or as a result directly and independently of all other causes of accidental bodily injuries sustained while this policy is in force, he becomes wholly and continuously disabled . . . .
>
> *Certain Disabilities Deemed Sickness.* For purposes of this policy, a period of disability shall be deemed to result from sickness if it (a) results from injuries caused or contributed to by disease, or (b) results from disease or infection, or medical or surgical treatment therefor . . . whether the disease or infection is the proximate or a contributing cause of the loss . . . .

In order to receive lifetime benefit payments, Button's total disability must be the result of an accident independent of all other causes.

In *New York Life Ins. v. Greber*, 55 Ariz. 261, 100 P.2d 987 (1940), the Arizona Supreme Court formulated the following test for determining whether death results solely from accidental causes:

> (a) When an accident causes a diseased condition which, together with the accident, results in death, the accident alone is considered the cause of death; (b) when at the time of the accident the insured was suffering from some disease, but such disease had no causal connection with the death resulting from the accident, the accident is the sole cause of the death, and (c) when at the time of the accident there was an existing disease which, cooperating with the accident, resulted in the death, the accident cannot be considered as the sole cause, independent of all other causes.

Id. at 263, 100 P.2d at 987.

[2] The Arizona Supreme Court has applied the *Greber* test to a disability insurance case. *See Dickerson v. Hartford Accident & Indem. Co.*, 56 Ariz. 70, 74-75, 105 P.2d 517, 519-20 (1940).

In *Watkins v. Underwriters at Lloyds, London*, 107 Ariz. 56, 481 P.2d 849 (1971), the Arizona Supreme Court applied a two-step inquiry to determine whether the plaintiff's death was directly or indirectly caused or contributed to by disease: (1) was there a disease, and (2) did the disease cause or contribute to the injury or death. *Id.* at 62, 481 P.2d at 855. Where there is no dispute as to the existence of a disease and the effect thereof, the issue becomes a question of law and the *Greber* test applies. *Id.*

[3] The deposition testimony of Dr. Toll, Button's physician, clearly indicates that Button had a preexisting disc problem. Dr. Toll confirmed that Button's degenerating disc became progressively more symptomatic. In his opinion, Button's disability from the injury was not independent of his prior back condition.[1] There is no testimony that indicates that the accident caused Button's disability independent of the preexisting disc problem.

[4] We agree with the district court that Button's degenerative disc condition falls within the third category of *Greber*. Because the accident was not the sole cause of Button's disability, he is not entitled to lifetime benefits.

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[1] Dr. Toll testified as follows:

A. I think that Mr. Button began showing symptoms of a degenerating disc back as far as 1959. If we follow the course of that, he became progressively more symptomatic. He had episodes early on which indicated that he was protruding a disc fragment. There was a hiatus of roughly two years when he did not have enough in the way of symptoms to come in and let me examine him.

Then he had the episode in question and he protruded a fragmented disc and never recovered from that. So it was a continuing problem, the symptoms of '79 precipitated by the lifting wind incident that's been described, and I don't think I can explain it any better than that.

Q. All right, let me – I appreciate that explanation. I take it then that the episode in December, 1979 and the disc protrusion, was not independent of the prior events?

A. Correct.

Button contends that in interpreting the policy, the court should use an ordinary layman's understanding of the term "disease." He argues that since there is no evidence that his condition would have become totally disabling without the injury, his preexisting condition was not a disease. This argument is without merit. The Arizona Supreme Court has stated:

> We think these definitions [from Webster's] represent the sense in which "disease" is understood by the layman, and that they imply a condition which either has impaired, or presumably will impair, *if it continues in its usual course of progress*, the normal working of some of the bodily or mental functions.

Dickerson, 56 Ariz. at 76-77; 105 P.2d at 520 (emphasis in original). All the evidence indicates Button's disc condition was and is a bodily condition that impaired the functioning of his spine. Button's condition was therefore properly a disease, and the district court was correct in granting summary judgment for CGL that Button's disability was contributed to by disease and not caused solely by accident.

II. *Incontestability Clause*

Button maintains that CGL is barred by section (b) of the incontestability clause of the policy from reducing his claim on the basis of a preexisting disease. Arizona law requires such a clause in every Arizona disability insurance contract.[2] The policy provides:

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[2] *Ariz. Rev. Stat. Ann.* § 20-1346 (West Supp. 1987) provides:

(Continued on following page)

Incontestable. (a) After this policy has been in force for a period of two years during the lifetime of

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(Continued from previous page)

Time limits on defenses

A. There shall be a provision as follows:

"Time limit on certain defenses: (a) After two years from the date of issue of this policy no misstatements, except fraudulent misstatements, made by the applicant in the application for such policy shall be used to void the policy or to deny a claim for loss incurred or disability (as defined in the policy) commencing after the expiration of such two year period."

"(b) No claim for loss incurred or disability (as defined in the policy) commencing after two years from the date of issue of this policy shall be reduced or denied on the ground that a disease or physical condition not excluded from coverage by name or specific description effective on the date of loss had existed prior to the effective date of coverage of this policy."

B. The policy provision set forth in (a) of subsection A of this section shall not be so construed as to affect any legal requirement for avoidance of a policy or denial of a claim during such initial two year period, nor to limit the application of §§ 20-1358, 20-1359, 20-1360, 20-1361 and 20-1362 in the event of a misstatement with respect to age or occupation or other insurance.

C. A policy which the insured has the right to continue in force subject to its terms by the timely payment of premium until at least age fifty or, in the case of a policy issued after age forty-four, for at least five years from its date of issue, may contain in lieu of (a) of subsection A of this section the following provision, from which the clause in parenthesis may be omitted at the insurer's option, under the caption "Incontestable:" "After this policy has been in force for a period of two years during the lifetime of the insured (excluding any period during which the insured is disabled), it shall become incontestable as to the statements contained in the application."

> the Insured (excluding any period during which the Insured is disabled), it shall become incontestable as to the statements contained in the application.
>
> (b) No claim for loss incurred or disability (as defined in the policy) commencing after two years from the Date of Issue of this policy shall be reduced or denied on the ground that a disease or physical condition not excluded from coverage by name or specific description effective on the date of loss had existed prior to the effective date of coverage of this policy.

We must decide whether this clause bars CGL from reducing or denying Button's claim for total disability commencing after the incontestability period because of a disc disease that preexisted issuance of the policy. Because this narrow question has not been previously passed upon by the Arizona courts nor by this court, we must make "a reasonable determination, based upon such recognized sources as statutes, treatises, restatements and published opinions, as to the result that the highest state court would reach if it were deciding the case." *Molsbergen v. United States*, 757 F.2d 1016, 1020 (9th Cir.), *cert. dismissed*, 473 U.S. 934 (1985).

[5] Courts have uniformly construed incontestability clauses as barring an insurer from declaring a policy invalid on the basis of misrepresentation in the application after lapse of the specified period. Annotation, *Construction of Incontestable Clause Applicable to Disability Insurance*, 13 A.L.R. 3d 1383, 1385 (1967). Whether a claim may be avoided or reduced based on a disease or disability which predated the policy is not as clear. Button relies upon *Fischer v. Massachusetts Casualty Ins. Co.*, 458 F. Supp. 939, 944-45 (S.D.N.Y. 1978), for the proposition that

the incontestability clause precludes the insurer from denying benefits for disability caused by diseases which became manifest prior to issuance of the policy, even though the policy covers only "sickness which first manifests itself during" the term of the policy.

[6] We believe that the better-reasoned view is that the incontestability clause relates to the validity of the contract and not to the construction of policy provisions. "An incontestability provision in a policy is designed to require the insurer to investigate an act with reasonable promptness if it wishes to deny liability on the grounds of false representation or warranty by the insured. . . . The purpose of an incontestable clause is to annul all warranties and conditions that might defeat the right of the insured after the lapse of the stipulated time." 18 G. Couch, *Cyclopedia of Insurance Law* § 72:2 (2d ed. 1983).

Cases from other jurisdictions support our conclusion. In *Minnesota Mutual Life Ins. Co. v. Morse*, 487 S.W.2d 317, 319 (1972), a Texas appeals court held that an incontestability clause should not be applied to change the meaning of policy terms or to enlarge its coverage. An Illinois court has held that an incontestability clause identical to section (b) of the instant policy merely prohibited the insurer from urging that the policy was invalid at its inception. It did not prohibit the insurer from defending on the ground that a preexisting disease proximately caused the disability. *Carlson v. New York Life Ins. Co.*, 76 Ill. App. 2d 187, 202-03, 222 N.E.2d 363, 368 (1966).

In *Posner v. New York Life Ins. Co.*, 56 Ariz. 202, 210, 106 P.2d 488, 492 (1940), the Arizona Supreme Court held

that an incontestability clause in a disability policy did not bar the insurer's efforts to show that the disability was caused by a disease existing on the policy date. The court noted that the insurer was not challenging the validity of the policy based on a preexisting disease, but claiming that the disability was not covered by the policy. *Id.* The court said that such policies do not cover disabilities caused by disease or injury which predate the policy and therefore, an incontestability clause could not bring such disabilities within the policy coverage. *Id.*

We are not dissuaded by the different result in *Robison v. Brotherhood of Railroad Trainmen Ins. Dept. Inc.*, 73 Ariz. 352, 241 P.2d 791 (1952). Robison stated that he had not suffered from tuberculosis and subsequently claimed disability based on it; the insurer rejected the claim on the ground that the policy covered only diseases "contracted during the term" of the policy and the disease predated the policy. *Id.* at 353-54, 241 P.2d at 792-93. The Arizona Supreme Court held that the specific language of the incontestability clause precluded inquiry into representations made by the insured concerning his physical condition after the lapse of two years: "[A]ny illness from which [the insured] thereafter suffers must be conclusively presumed to have arisen after the issuance of the policy." *Id.* at 354-56, 241 P.2d at 793-94. The court noted that the incontestability clause in *Posner* was "general in its terms," and so did not mandate the same result.[3] *Id.* at 355-56, 241 P.2d at 794.

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[3] The incontestability clause in *Robison* provided: " 'If this Certificate has been in force two years during the lifetime of

(Continued on following page)

[7] In the case before us, Button does not argue that his disability was caused by a disc condition preexisting issuance of the policy. Rather, he contends that his disability was caused solely by the 1983 lifting accident and that the incontestability clause precludes CGL from inquiring into his back condition to contest his claim. CGL, however, does not argue that Button's claim is barred because his disc condition predated the policy. CGL merely contends that the disease, *regardless of when it arose,* contributed to Button's disability. The determining factor here is causation, not the insured's physical condition on the date of the policy. Causation was not at issue in *Robison;* the court did not address whether the insured's disability was caused solely by tuberculosis.

[8] The policy does not penalize Button for having a disease preexisting the issuance of the policy. Under the *Certain Disabilities Deemed Sickness* clause, any injury contributed to by disease, whether preexisting the policy or not, is deemed to be a sickness. The definitional clause

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(Continued from previous page)

the Member, *it shall be incontestable as to the accuracy of the representations contained in the application herefor and as to the physical condition of the Member on the date hereof. . . .'* " (Emphasis in original) 73 Ariz. at 354, 241 P.2d at 792. The *Posner* clause provided: "This policy shall be incontestable after two years from its date of issue except for nonpayment of premium." *Id.* at 355-56, 241 P.2d at 794.

The clause at issue in this case does not contain language precluding the insurer from inquiring into the insured's physical condition on the policy date as did the clause in *Robison.* We note that the Arizona legislature enacted the incontestability law in 1954, two years after the *Robison* decision.

merely spells out the scope of the risks covered by the contract, and does not preclude reliance upon a condition which preexisted issuance of the policy to determine the duration of benefits. The incontestability clause does not invalidate those provisions.[4]

III. *Bad Faith and Estoppel*

Our conclusion that CGL properly limited Button to sickness benefits requires us to reject Button's bad faith claim. We agree that CGL complied with the policy by paying Button sickness benefits rather than lifetime injury benefits. CGL's refusal to continue payments beyond the five year period cannot be considered in bad faith.

Button additionally contends that CGL should have notified him sooner that the benefits were pursuant to sickness rather than accident. Button has failed to demonstrate that CGL had a legal or contractual duty to notify him. We do not believe that CGL's delay constitutes bad faith.

Finally, this court rejects Button's estoppel claim. The doctrine of estoppel is well established in Arizona. *United States Fidelity and Guaranty Co. v. Stewart's Downtown Motors,* 336 F.2d 549, 556 (9th Cir. 1964). The essential elements of equitable estoppel are "(1) conduct by which one induces another to believe in certain material facts; and (2) the inducement results in acts in justifiable

---

[4] For a discussion of the rationale for so limiting incontestability clauses *see* 1A J. Appleman, *Insurance Law and Practice* § 335 (1981).

reliance thereon; and (3) the resulting acts cause injury." *Heltzel v. Mecham Pontiac*, 152 Ariz. 58, 61, 730 P.2d 235, 238 (1986). Button contends that CGL's initial classification of his claim as one resulting from an accident amounted to an implied representation that he would continue to receive benefits based on that classification. There is no showing, however, that Button relied on such alleged misrepresentation to his detriment. Button's estoppel claim therefore fails.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DALE G. BUTTON, and GLORIANNA BUTTON, husband and wife, Plaintiffs, vs. CONNECTICUT GENERAL LIFE INSURANCE COMPANY and CIGNA INSURANCE COMPANY, Defendants.	No. CIV 85-985 TUC ACM *MEMORANDUM OF DECISION AND ORDER* (Filed October 16, 1986)

This action arises out of an insurance contract for disability benefits. Plaintiffs originally filed their complaint in Pima County Superior Court for breach of contract and declaratory judgment. The case was removed to Federal District Court. Jurisdiction in this matter is based upon diversity and is not in issue.

Defendants moved for summary judgment and a hearing occured on September 8, 1986. The court granted a motion on September 9, 1986. Plaintiff filed a notice of appeal on October 8, 1986.

The facts of this case are simple and not in dispute. On or about September 8, 1975, Plaintiff Dale Button applied for and did obtain a policy for disability benefits (Policy No. M1646552). See Exhibit A to Plaintiff's Opposition to Motion for Summary Judgment. The policy was issued on September 19, 1975. On December 16, 1979, Plaintiff was injured while lifting a heavy sheet of roofing material. Mr. Button sustained injuries to his back and is at present totally disabled. Upon notice to the insurance company, Defendants have paid monthly disability

indemnity benefits in the amount of $700 to Mr. Button from December 16, 1979 through August 9, 1985. Defendants determined that Mr. Button's disability was an injury arising out of sickness rather than accident and was therefore subject to a maximum indemnity period of sixty months under the terms of the contract. Plaintiffs contend the injury is one arising out of an accident and Mr. Button is entitled to benefits for life.

Defendants moved for summary judgment on the following grounds: (1) that Mr. Button's disability resulted from an injury caused, or contributed to, by his degenerative disc disease and was not the result of an accident directly and independently of all other causes; (2) that injuries contributed to by disease are deemed a sickness under the terms of the contract; (3) that Mr. Button is therefore not entitled to lifetime benefits; and (4) that the incontestability clause in the policy refers to representations made by the insured and does not apply to interpretation of the policy.

The court finds that there are no genuine issues of material fact. Accordingly, pursuant to Rule 56, Federal Rules of Civil Procedure, Defendants are entitled to summary judgment.

A. *The Nature of the Injury*

The dispositive issue in this case is whether Mr. Button's disability is a result of accident or sickness. The parties treat this as a question of law and do not dispute the underlying facts. A determination of this issue depends upon state law. The following line of Arizona cases mandates judgment in favor of defendants.

The seminal case in Arizona on this issue is *New York Life Ins. Co. v. Greber*, 55 Ariz. 261, 100 P.2d 987 (1940). In *Greber*, the Arizona Supreme Court formulated the following test for determining whether death results solely from accidental causes:

(a) "when an accident causes a diseased condition which, together with the accident, results in death, the accident alone is considered the cause of death;

(b) when at the time of the accident the insured was suffering from some disease, but such disease had no causal connection with the death resulting from the accident, the accident is the sole cause of the death, and

(c) when at the time of the accident there was an existing disease which, cooperating with the accident, resulted in the death, the accident cannot be considered as the sole cause, independent of all other causes."

100 P.2d at 987.

The plaintiff in *Greber* was suffering from pneumonia and myocarditis at the time of her automobile accident. Plaintiff had improved somewhat before the accident but after the accident died of pneumonia. The life insurance policy provided double indemnity for accidental death. The jury returned a verdict in favor of the plaintiff. The Arizona Supreme Court, applying the test stated above, reversed the jury verdict, stating the plaintiff did not sustain her burden of proof.

In *Dickerson v. Hartford Accident & Indemnity Co.*, 56 Ariz. 70, 105 P.2d 517 (1940), the Arizona Supreme Court

considered what is meant by the term "disease". In *Dickerson,* the policy was for disability insurance unlike *Greber* which involved life insurance. In *Dickerson,* the plaintiff had an excess of uric acid in his blood. As a result of the trauma occasioned by his accident, he developed gout which caused total and then partial disability. The policy excepted losses caused directly or indirectly by disease. Using the test set forth in *Greber, supra,* the court stated that "the principle involved is the same when compensation for disability is involved." *Dickerson,* 105 P.2d at 519.

The court determined that the ordinary lay definition of disease was to be used. The court stated:

> "We think these definitions (from Webster's) represent the sense in which 'disease' is understood by the layman, and that they imply a condition which either has impaired, or presumably will impair, *if it continues in its usual course of progress,* the normal working of some of the bodily or mental functions."

105 P.2d at 520.

The court held that under this definition, the jury might have found that plaintiff's condition fell under (a) in the *Greber* test and not (c). The court reversed and remanded for a new trial.

In the present case, it is undisputed that Mr. Button had a pre-existing disc problem. Dr. Toll's deposition testimony clearly indicates the relationship between Mr. Button's prior back problems and the injury in question:

> A. "I think that Mr. Button began showing symptoms of a degenerating disc back as far as 1959. If we follow the course of that, he became progressively more symptomatic. He had episodes early on which

indicated that he was protruding a disc fragment. There was a hiatus of roughly two years when he did not have enough in the way of symptoms to come in and let me examine him.

"Then he had the episode in question and he protruded a fragmented disc and never recovered from that. So it was a continuing problem, the symptoms of '79 precipitated by the lifting wind incident that's been described, and I don't think I can explain it any better than that.

Q. "All right, let me – I appreciate that explanation. I take it then that the episode in December, 1979 and the disc protrusion, was not independent of the prior events?

A. "Correct."

Deposition of Dr Toll at p. 35, lines 1-19.

Defendants in their motion for summary judgment argue that if Mr. Button's degenerative disc "disease" would have resulted in disability had it continued in its usual course of progress, then Mr. Button fails within subsection (c) of the *Greber* test. Accordingly, the accident cannot be considered as the sole cause, independent of all other causes and Mr. Button is not entitled to lifetime benefits.

In *Watkins v. Underwriters at Lloyds, London*, 107 Ariz. 56, 481 P.2d 849 (1971), the Arizona Supreme Court again confronted the issue in *Greber, supra*. In *Watkins*, the plaintiff had a pre-existing heart condition although it had only caused complaint on two previous occasions. While engaged in strenuous activity, the plaintiff had a heart attack and died. The accident insurance policy excluded death or injury "directly or indirectly caused or contributed to by . . . disease or natural causes."

At trial, the court directed a verdict for defendants. Plaintiff argued this was a question of fact for the jury. The Arizona Supreme Court, in deciding the issue, broke their inquiry into two parts: (1) was there a disease; and (2) did the disease cause or contribute to the injury or death. The court found that there was a disease. Moreover, the evidence indicated that the disease caused the plaintiff's death. Where there is no dispute as to the existence of a disease and the effect thereof, the issue is a question of law and turns upon application of the *Greber* test.

Applying Arizona law, this court finds that the accident sustained by Mr. Button was not the sole cause of his injury, independent of all other causes. In other words, applying *Greber, supra,* Mr. Button falls in the third category. Accordingly, under the terms of the policy, his injury is deemed a sickness and he is entitled to benefits for a maximum of sixty months.

Plaintiffs rely upon *Central National Life Ins. Co. v. Peterson,* 23 Ariz. App. 4, 529 P.2d 1213 (1975). In *Peterson,* the plaintiff had a myocardial infarction while performing heavy labor on electrical generating equipment. Plaintiff had previously been diagnosed as having a heart condition. He was disabled as a result of the attack. The court considered whether this was an accidental bodily injury so that plaintiff would be entitled to benefits for five years or whether this was a sickness so that benefits would be allowed only for twenty-four months. The court stated:

> "An accidental bodily injury implies some degree of physical force, no matter how slight. The

> physical force in this case consisted of appellee's exertion in doing his job."

529 P.2d at 1217.

The court in *Peterson, supra,* held that this was properly considered an accidental bodily injury. The language of the case is consclusory (sic) and fails to state any reasoning in support of this bald assertion. This holding is inconsistent with the holding in *Watkins, supra.* In both cases, there was an external cause operating on the plaintiff but each case reaches a different result. It is uncontested that Mr. Button was acted upon by a physical force. However, for the following reasons, the court rejects the holding in *Peterson.*

First, the *Peterson* case is out of the Court of Appeals while all the other cases developing this issue have been decided by the Arizona Supreme Court. This court declines to follow a case from the Arizona Court of Appeals which is plainly inconsistent with the prior rulings of the Arizona Supreme Court.

Second, the court in *Peterson* did not apply the test laid down in *Greber.* Arizona case law indicates that interpretation of policies hinges upon application of the *Greber* test. In fact, this court believes that had the Court of Appeals applied the test formulated in *Greber, supra,* the court would likely have reached a contrary result. Therefore, this court declines to follow *Peterson.*

B. *The Incontestability Clause*

Plaintiffs contend the incontestability clause in the insurance contract bars Defendants from reducing Mr. Button's claim on the basis of a pre-existing disease.

However, Plaintiffs have not cited any authority in favor of this proposition. The only authority cited by Defendants deals with false representations by the insured on the application. See *National Producer's Life Insurance Co. v. Rogers*, 8 Ariz.App. 53, 442 P.2d 876 (1968). That case is not applicable to the facts of the present case. It has never been alleged that plaintiffs made false representations to the defendants.

Interpretation of the policy is a question of law and the policy must be given effect as it is written. *Amfac Distribution Corp. v. J.B. Contractors*, 146 Ariz. 19, 703 P.2d 566, 570 (App. 1985). The clause in question is subsection (b) of the incontestability clause which reads:

> (b) "No claim for loss incurred or disability (as defined in the policy) commencing after two years from the Date of Issue of this policy shall be reduced or denied on the ground that a disease or physical condition not excluded from coverage by name or specific description effective on the date of loss had existed prior to the effective date of coverage of this policy."

If this court accepted Plaintiffs' interpretation of the contract, it would require rewriting of major portions of the contract. The provisions in the policy titled "Disability defined" and "Certain Disabilities Deemed Sickness" limit the amount an insured can receive if his injury is caused by sickness. The incontestability clause does not invalidate those provisions. This court will not rewrite the contract to reach a desired result. *See Harbor Ins. Co. v. United Services Auto. Ass'n.*, 114 Ariz. 58, 559 P.2d 178, 181 (App. 1976). The incontestability clause is not applicable and Defendants are entitled to judgment in their favor.

C. *Conclusion*

This court finds that Mr. Button's injury was caused or contributed to by his degenerative disc problem. This is deemed sickness under the terms of the policy and the maximum indemnity period is sixty (60) months. Defendants have paid benefits for the maximum period and have therefore discharged their obligations under the contract. Defendants are entitled to judgment in their favor as a matter of law and this court grants their motion for summary judgment.

IT IS ORDERED that summary judgment is granted in favor of the Defendants. Judgment shall be entered in favor of Defendants and against Plaintiffs.

IT IS FURTHER ORDERED that this Memorandum be made part of the record for appeal.

Dated this 15th day of October, 1986.

/s/ A. C. Marquez
ALFREDO C. MARQUEZ
United States District Judge

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Supreme Court, U.S.
FILED
SEP 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-359

In The

Supreme Court of the United States

October Term, 1988

DALE G. BUTTON AND
GLORIANNA BUTTON,
husband and wife,

Petitioners,

v.

CONNECTICUT GENERAL LIFE INSURANCE
COMPANY and CIGNA INSURANCE COMPANY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The respondents are not in agreement with the argumentative, rhetorical questions posed as "issues" in the petition.

If there is any question arguably presented in this case, it is as follows:

> Has the United States Court of Appeals for the Ninth Circuit, applying Arizona law to affirm the judgment entered against the petitioners, departed from the accepted and usual course of judicial proceedings, or sanctioned any such departure by the United States District Court for the District of Arizona, and if so, is the departure so extreme as to call for an exercise of this Court's power of supervision?

LIST OF PARTIES

The list of parties in the petition is complete. The respondents are corporations.[1]

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[1] In compliance with Rule 28.1, Rules of the Supreme Court of the United States, respondents offer the following listing of parent corporatons (all subsidiaries are wholly-owned, and there are no other affiliates):

Connecticut General Life Insurance Company, a Connecticut corporaton:

> Parent corporations: CIGNA Corporation, a Delaware corporation; CIGNA Holdings, Inc., a Delaware corporation; Connecticut General Corporation, a Connecticut corporation

CIGNA Insurance Company, a California corporation:

> Parent corporations: CIGNA Corporation, a Delaware corporation; CIGNA Holdings, Inc., a Delaware corporation; INA Corporation, a Pennsylvania corporation; INA Financial Corporation, a Delaware corporation

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CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

The respondents do not agree that the seventh amendment right to a jury trial is involved in this case[2], but do agree that Rule 56(c) of the Federal rules of Civil Procedure, quoted in the petition, is applicable.

This case also involves the following:

Rule 56(e), Federal Rules of Civil Procedure:

> . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Rule 11(i)(1) of the Rules of Practice for the United States District Court for the District of Arizona:

> Any party filing a motion for summary judgment shall set forth separately from the memorandum of law, and in full, the specific facts on which he relies in support of his motion. The specific facts shall be set forth in serial fashion and not in narrative form. As to each fact, the statement shall refer to a specific portion of the record where the fact may be found (i.e., affidavit, deposition, etc.). Any party opposing a motion for summary judgment must comply with the foregoing in setting forth the specific facts which establish a genuine issue of material fact precluding summary judgment in favor of the moving party . . .

---

[2] No constitutional issues were raised in the courts below.

Arizona Revised Statutes, Section 20-1346(A):

> There shall be a provision [in disability insurance policies] as follows: . . .
>
> (b) No claim for loss incurred or disability (as defined in the policy) commencing after two years from the date of issue of this policy shall be reduced or denied on the ground that a disease or physical condition not excluded from coverage by name or specific description had existed prior to the effective date of coverage of this policy.

Rule 49.2, Rules of the Supreme Court of the United States:

> When an appeal or a petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages.

STATEMENT OF THE CASE

As this brief is prepared, respondents have not received notice of a request for certification of a record, nor do respondents believe that reference to a record is necessary to an understanding of the case. The essential factual and procedural background is set forth in the opinion of the court of appeals.

Except for its argumentative surplus, the statement of the case contained in the petition is correct in its statement of procedural history. It suffers, however, from glaring errors of omission.

First, the petition does not mention the policy paragraphs that were the legal basis for the decisions below. Those paragraphs, quoted completely by the court of appeals, slip opinion, p. 5, addressed the foundational

underpinning of this case, in which disability resulted from the combined effect of both sickness and accident. The first paragraph, entitled "Total Disability Defined," referred to disability from "accident" as one resulting from accident "directly and independently of all other causes." The second, entitled "Certain Disabilities Deemed Sickness," provided that a disability would be deemed to result from sickness if it resulted "from injuries caused or contributed to by disease," or if it resulted "from disease or infection . . . whether the disease or infection [was] the proximate or a contributing cause of the loss." The effect of these provisions was, as summarized by the court of appeals, "In order to receive lifetime benefit payments, Button's disability must be the result of an accident *independent of all other causes*." Slip opinion, p. 6, emphasis added.

The petition also fails to mention the uncontroverted factual basis for the decisions below. The respondents' motion for summary judgment was prepared in accordance with the district court's local rule 11(i)(1), quoted verbatim above, and alleged:

> H. That plaintiff's disability subsequent to the December 1979 accident was not "a result directly and independently of all other causes of accidental bodily injuries" . . .
>
> I. That the injuries sustained by plaintiff on December 16, 1979, were "contributed to by disease."

These allegations were supported by references to the deposition testimony of plaintiff Dale Button and his physician, Dr. Richard Toll.

The pertinent testimony of Mr. Button was that he had an extensive history of back problems and pain

beginning in the 1960's, including hospitalization in traction in 1976 and repeated episodes of pain during the two years immediately preceding the accident. Dr. Toll's testimony, quoted in part in the first footnote to the Ninth Circuit's opinion, was that Mr. Button had suffered from degenerative disc disease since his teen-age years[3], and that this disease had contributed to the injury and disability.

In their written opposition to the motion for summary judgment, the petitioners simply stated that they "disputed" paragraphs H and I of the statement of facts, quoted above. They presented no affidavits. Nor did they refer to any deposition testimony, interrogatory responses, or any other part of the record to contradict the cited testimony. They conceded the truth of Dr. Toll's testimony, and agreed that the Mr. Button's accident had "triggered his dormant back condition." Plaintiffs' memorandum in opposition to motion for summary judgment, p. 10, l. 5.

The petitioners also made legal arguments. They argued that the "incontestability clause" of the policy, mandated by Arizona Revised Statutes §20-1346(A), precluded classification of the disability as one resulting from sickness, that the respondents had acted in bad faith, and that the respondents were estopped from terminating benefits because of their failure to notify the petitioners that the disability had resulted from sickness.

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[3] According to the petition, Mr. Button was 37 years old at the time of his injury in 1979. According to Dr. Toll, Mr. Button had suffered from degenerative disc disease since 1959, i.e., age 17 or 18.

The district court agreed that the fact of concurrent causation was undisputed, applied Arizona law disposing of the petitioners' other legal arguments, and entered summary judgment in favor of the respondents. The court of appeals affirmed the judgment, and the petitioners have now filed a petition for certiorari within the time limits prescribed by 28 U.S.C. §2101(c).

ARGUMENTS

(Reasons for Denying the Writ)

I

This case involves no federal question of public importance that would warrant review through a grant of certiorari.

Rule 17.1 of this Court contains a clear message that the writ of certiorari will be issued only where there are special and important reasons. *Fay v. Noia*, 372 U.S. 391, 436 (1963). As Chief Justice Taft once cautioned in a unanimous opinion of this Court:

> . . . [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

This case presents no issues of public importance that would warrant review on certiorari. This is a diversity case governed entirely by the substantive law of the State of Arizona. In the lower courts, the primary legal issue

was determined by simple application of state law principles established by prior opinions of the Arizona Supreme Court. On its undisputed facts, the case fell squarely within the paramenters established by the Arizona court's decisions defining "disease" as including Mr. Button's degenerative disc disease, *Dickerson v. Hartford Accident and Indem. Co.*, 56 Ariz. 70, 76-77, 105 P.2d 517, 520 (1940), and holding that an accident could not be considered the sole cause of a loss concurrently caused by an existing disease. *New York Life Ins. v. Greber*, 55 Ariz. 261, 263, 100 P.2d 987 (1940).

No significant federal issues were raised in the courts below. In its entire opinion, the Ninth Circuit made only two brief statements of federal law, as follows:

> This diversity case is governed by the substantive law applicable in the forum state. As such, Arizona law is controlling. Slip opinion, p. 5, citing *Strassberg v. New England Mutual Life Ins. Co.*, 575 F. 2d 1262 (9th Cir. 1978)
>
> Because this narrow question [the effect of the incontestability clause] has not been previously passed upon by the Arizona courts nor by this court, we must make "a reasonable determination, based upon such recognized sources as statutes, treatises, restatements and published opinions, as to the result that the highest state court would reach if it were deciding the case." Slip opinion, p. 10, quoting *Molsbergen v. United States*, 757 F.2d 1016 (9th Cir.) cert. dismissed, 473 U.S. 934 (1985).

These unremarkable statements of federal law are not mentioned in the petition. Instead, petitioners have asserted that the Ninth Circuit's decision means that "havoc will be wrought upon the uniform and equitable

system of civil procedure." Despite that assertion, however, petitioners have not even attempted to identify a single error or misstatement of federal law, procedural or otherwise, in the opinion of the court of appeals. In fact, petitioners correctly note that the opinion made no mention of the federal standards for determination of summary judgment motions. Petition, pp. 7-8.

The opinion does not depart at all from established principles governing determination of motions for summary judgment. It sets no new precedent. It contains no unusual statements of law that would permit district courts to "weigh" conflicting evidence in determining motions under Rule 56 or otherwise to depart from usual procedural standards. Petitioners' dire claims to the contrary are merely claims that the well-established law correctly stated in the opinion was incorrectly applied in this individual case. Those claims are wholly unfounded, but even if they were not, they would not justify a grant of certiorari by this court.

II

The case was correctly decided with a fair and just result.

The petitioners' claims of legal error in the courts below are impossible to follow and difficult to answer. The petitioners, for instance, accuse the court of appeals of acting "as a trier of fact" simply for noting that "the determining factor here is causation." Petition, p. 7. Given the language of the policy, it is difficult to imagine how that statement could be disputed. It is so obviously true that any effort to classify it as a "legal" or "factual" conclusion would be frivolous.

The petition repeatedly asserts that there were genuine issues of material fact, then purports to identify four such issues. Petition, p. 10. Three of those are legal issues, not factual, and were either treated as such and disposed of in the lower courts or recognized as irrelevant. The only factual question identified, that of concurrent causation, was undisputed. Even in this court, the petitioners have not identified a single piece of evidence suggesting that Dale Button's back injury was independent of his degenerative disc disease. Petitioners apparently believe that the abstract suggestion of disputed facts precludes summary judgment, or that a genuine factual dispute is created by their simple assertion that they "dispute" the facts. Rules 56(e) of the Federal Rules of Civil Procedure and 11(i)(1) of the district court's local rules clearly provide otherwise. A plaintiff may not avoid summary judgment merely by denying the truth of the defendants' evidence, but must affirmatively produce significant probative evidence that supports the complaint and could reasonably lead to a verdict in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-257 (1986); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968).

At another point, the petitioners assert that, "The linchpin factual issue in Mr. Button's suit . . . [was] whether any pre-existing back condition disabled him prior to the injury." Petition, p. 11. This inexplicable statement, ignoring the language of the policy, is followed by extensive quotation from Justice Cardozo's opinion in *Silverstein v. Metropolitan Life Ins. Co.*, 254 N.Y. 81 (1930). The quotations do not contain a single statement of law applicable to the issues in this case.

The petitioners' real complaint in this case, however, is revealed by their reliance upon the *Silverstein* opinion. As a matter of Arizona law, any condition "which either has impaired, or presumably will impair, if it continues in its usual course of progress, the normal working of some of the bodily or mental functions" is a "disease." *Dickerson v. Hartford Accident & Indem. Co., supra.* The petitioners nevertheless believe that degenerative disc disease, and presumably other degenerative conditions that afflict large numbers of persons, should not be regarded as disease or sickness for purposes of construing disability insurance policies.

In their zealous advocacy of such a theory, petitioners have overlooked the substantial benefits of Arizona's definition of disease. Disability insurance policies generally provide benefits for disability resulting only from accident or sickness. If degenerative conditions were excluded from the definition of sickness, persons who became disabled as a result of such conditions, without also suffering accidental injuries, would be entitled to no benefits whatever under their policies. The petitioners' distaste for the *Dickerson* definition stems solely from the peculiar facts of this case, in which Dale Button did suffer accidental injuries. If he had not, and had become disabled solely as a result of his degenerative disc disease, their "still, small voice" would instead be loudly defending the broad definition of disease adopted by the Supreme Court of Arizona.

CONCLUSION

The suggestion that this case involves any substantial issue of federal law worthy of consideration on certiorari is preposterous, and respondents respectfully request that the writ be denied.

Respondents further respectfully request that an amount equal to their costs and attorneys' fees incurred in opposing the petition be awarded to them as damages under authority of Rule 49.2, Rules of the Supreme of the United States. There is nothing here which would reasonably support a belief that cetiorari should or would be granted to review a case so totally devoid of federal issues. In addition, the petitioners' blatant omission of both the factual and legal bases for the decisions of the lower courts and their repeated misstatements of the determinative state questions demonstrate that the petition is not only frivolous, but brought in bad faith as well. An award of fees and costs is clearly appropriate.

RESPECTFULLY SUBMITTED this 21st day of September, 1988.

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No. 88-359

Supreme Court, U.S.
FILED
SEP 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1988

———o———

Dale G. Button and Glorianna Button,
husband and wife,

Petitioners,

v.

Connecticut General Life Insurance Company
and Cigna Insurance Company,

Respondents.

———o———

REPLY BRIEF

———o———

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REPLY BRIEF

Rule 22.5 of the Rules of the Supreme Court of the United States provides that "A Reply Brief addressed to arguments first raised in the Brief in Opposition may be filed". The Respondents raise such an issue by requesting that costs and attorney's fees be awarded under authority of Rule 49.2 of the Rules of the Supreme Court of the United States. In their conclusion, Respondents claim that the Petition is devoid of federal issues, frivolous, and brought in bad faith. Opposition, p. 10.

Petitioners, therefore, find it necessary to respond to this new charge of bad faith. The major argument raised in the Petition questions the Ninth Circuit Justices' failure to consider the Federal Rules of Civil Procedure, Rule 56. In point of fact, that is what the Ninth Circuit Justices did. We reiterate our argument "at no point in the discussion did the Ninth Circuit Justices refer to the Rule 56 standard of review or the decisions of the Ninth Circuit and this Court governing summary judgment in finding against the Petitioner." Petition, pages 7, 8.

The Respondent's statement at page 7 of their Opposition that "Petitioners *correctly* note that the opinion [Ninth Circuit] made no mention of the federal standards for determination of summary judgment motions" is a glaring admission of the main thrust of the Petitioners' argument. (Emphasis added)

The Respondents charge of bad faith is a smoke screen designed to turn this Honorable Court's attention away from the heart and soul of the Petitioners' argument. This is not a case in which the Petitioners are frivolously and in bad faith buying delay time to avoid paying a money

judgment. *Barrow v. Hill,* 54 U.S. 54 (1852); *Prentice v. Pickersgill,* 73 U.S. 511 (1868); *Wagner Electric Mfg. Co. v. Lyndon,* 262 U.S. 226 (1923). This is the Petitioners' last resort to clear away the smoke screen which has been so aptly applied by the Respondents in the courts below.

The Petitioners request that this Honorable Court disregard these cavalier claims of frivolity and bad faith. The Petition raises serious issues of national importance which call out for the invocation of this Honorable Court's inherent supervisory authority over the federal judiciary. The Petition is not devoid of federal issues. The Ninth Circuit should not be allowed to omit or even gloss over this Honorable Court's standards for determining summary judgment motions. By virtue of Respondents' own admission, the Ninth Circuit has ignored the federal standards relating to summary judgment.

The Respondents' charge of bad faith should be summarily dismissed. The Petitioners' prayer for granting a Writ of Certiorari should be allowed to proceed.

Respectfully submitted this 29th day of September, 1988.

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